BRB No. 03-0568

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| VERNA CHAMBERLISS | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: April 29, 2004 |
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| Self-Insured Employer-Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order Granting Motion for Summary Decision and the Order Denying Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Charlene Parker Brown (Montagna Breit Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Motion for Summary Decision and the Order Denying Motion for Reconsideration (2003-LHC-0802) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered a work-related injury to her right knee on September 24, 1999, and received voluntary payments of compensation from employer during the period of October 29, 1999, to September 14, 2000. Thereafter, in accordance with the parties'

stipulations, the district director issued a compensation order on August 16, 2001, awarding claimant temporary total disability benefits from October 29, 1999 to September 14, 2000, and permanent partial disability benefits for a 15 percent impairment to claimant's right lower extremity. On September 26, 2001, claimant sent a letter to the Office of Worker's Compensation Programs requesting a "minimal ongoing compensation award" pursuant to *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT)(1997). After the claim was transferred to the Office of Administrative Law Judges, claimant filed a Form LS-18, Pre-Hearing Statement, stating that she was seeking modification pursuant to Section 22 of the Act for a *de minimis* award.

Employer subsequently filed a motion for summary decision on the grounds that claimant, who has sustained an injury and has received benefits under the Act's schedule, cannot be given a *de minimis* award for permanent partial disability pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21), of the Act. Claimant opposed employer's motion, averring that she has presented for adjudication before the administrative law judge a material issue in dispute between the parties, specifically whether or not her work-related condition has reached maximum medical improvement. In this regard, claimant took the position that her condition has not reached maximum medical improvement based in part upon her treating physician's opinion that further surgery will be needed and that, thus, she is not precluded from receiving a nominal award under the Act.

The administrative law judge granted employer's motion for summary judgment, finding 1) that claimant's prior stipulation with regard to the permanency of her right lower leg condition is binding upon the parties, 2) that a *de minimis* award would fall under Section 8(c)(21) of the Act, and 3) that claimant, pursuant to *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980), and *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002), is precluded from receiving benefits under Section 8(c)(21) for a permanent partial disability to a body part covered by the schedule. Claimant subsequently sought reconsideration of the administrative law judge's decision. Stating that there was no need to litigate the question of maximum medical improvement since claimant's modification claim for a *de minimis* award under Section 8(c)(21) is incompatible with her prior award under the schedule, the administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in granting employer's motion for summary decision, as there was a genuine issue of material fact presented for adjudication before him. Employer responds that the administrative law judge's grant of summary decision was appropriate as claimant is not entitled as a matter of law to a *de minimis* award under the facts of this case.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules),[1] any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. 29 C.F.R. '18.40(a). Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary decision for either party. 29 C.F.R. ''18.40(d), 18.41(a); *see Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003).

The purpose of the summary judgment procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Dunn v. Lockheed Martin Corp.*, 33 BRBS 204 (1999). Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id.* In determining if summary judgment is appropriate, the court must draw all reasonable inferences in favor of the party opposing the motion and must look at the record in the light most favorable to the party opposing the motion. *See Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). To defeat a motion for summary judgment, the party opposing the motion must establish the existence of a genuine issue of material fact; a fact is material if it affects the outcome of the litigation. *See Hahn*, 523 F.2d at 464.

The question of whether claimant's condition reached maximum medical improvement is an issue of material fact which affects claimant's potential entitlement to an award of temporary partial disability compensation pursuant to Section 8(e) of the Act, 33 U.S.C. §908(e). Therefore, we hold that the administrative law judge erred in granting summary decision in favor of the employer in this case. For the following reasons, the administrative law judge's decision is vacated, and the case is remanded for consideration consistent with this decision.

It is well-established that Section 22 of the Act, 33 U.S.C. §922, provides the only means for changing otherwise final decisions; modification pursuant to this section is permitted based upon a mistake of fact in the initial decision or a change in claimant's physical or economic condition. *See Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT)(1995); *Wheeler v. Newport News Shipbuilding & Dry*

[1] The OALJ Rules apply to this issue, as they are not inconsistent with a rule of special application as provided by statute or regulation. 29 C.F.R. '18.1; *see Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

*Dock Co.*, 37 BRBS 107 (2003). Thus, a party may seek modification in an attempt to establish that claimant's condition has changed, s*ee generally Ramos v. Global Terminal & Container Services, Inc.*, 34 BRBS 83 (1999); additionally, the administrative law judge has broad discretion to correct mistakes of fact. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971), *reh'g denied*, 404 U.S. 1053 (1972). Moreover, contrary to the administrative law judge's statement that the parties stipulations regarding the nature of claimant's condition are binding on the parties with regard to the permanency of claimant's right lower leg condition, a district director's order based on stipulations is subject to modification. *See, e.g., Ramos*, 34 BRBS 83; *Lawrence v. Toledo Lake Front Docks*, 21 BRBS 82 (1988). Accordingly as a claimant may file a motion for modification averring either that there has been a change in her physical condition or that there was a mistake of fact in the initial decision, we reverse the administrative law judge's determination that claimant is bound by her prior stipulation regarding the nature of her disability.

We additionally cannot affirm the administrative law judge's conclusion that the nominal award of compensation sought by claimant on modification must be addressed pursuant to Section 8(c)(21) of the Act, 33 U.S.C. §908(c)(21). Contrary to both employer's interpretation of claimant's motion for modification and the administrative law judge's findings on this issue, at no point in the proceedings below did claimant aver that she was seeking a *de minimis* award pursuant to Section 8(c)(21) of the Act.[2] Rather, claimant's pre-hearing statement indicates only that she sought modification for a *de minimis* award. Thereafter, claimant unequivocally stated in her response to employer's motion for summary decision that she sought modification based on the premise that her condition was not yet permanent, *i.e.*, that she had yet to reach maximum medical improvement. Claimant did not, however, specifically designate the subsection of the Act under which she sought additional compensation. If claimant succeeds in establishing that her present condition is temporary in nature, she may be entitled to an award of temporary partial disability compensation pursuant to Section 8(e) of the Act, 33 U.S.C. §908(e). *See McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998)(Claimant with a scheduled injury which has not yet reached maximum medical improvement can receive temporary partial disability benefits). Moreover, the Board has held that, as an award pursuant to Section 8(e) is explicitly predicated on a loss of wage-earning capacity as determined under Section 8(h) of the Act, 33 U.S.C. §908(h), a nominal award of compensation may be entered pursuant to Section 8(e). *See Gillus v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 93

[2] The administrative law judge correctly stated in his decision that such an award under the facts presented in this case is precluded by the Board's decision in *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113 (2002)(Board holds that claimant, whose injury was to a body part covered by the schedule, was not eligible for benefits pursuant to Section 8(c)(21)).

(2003), *aff'd mem.*, 84 Fed. Appx 333, 37 BRBS 120(CRT) (4th Cir. 2004). Thus, contrary to the administrative law judge's determination, the decisions of the Supreme Court in *Potomac Electric Power Co.*, 449 U.S. 268, and the Board in *Porter*, 36 BRBS 113, are not dispositive of the issue raised before him in claimant's petition for modification. We therefore reverse the administrative law judge's determination that claimant improperly sought to acquire a *de minimis* award under Section 8(c)(21) of the Act for an injury to a body part covered by the schedule, as that finding is unsupported by the record.

In summary, we vacate the administrative law judge's summary decision, and we remand the case for the administrative law judge to consider claimant's motion for modification. Claimant has sought modification on the grounds that her condition is not presently permanent in nature; this contention raises an issue of material fact which affects claimant's potential entitlement to temporary partial disability compensation pursuant to Section 8(e) of the Act. Thus, on remand, the administrative law judge must address claimant's evidence regarding this issue.

Accordingly, the Decision and Order Granting Motion for Summary Decision and the Order Denying Motion for Reconsideration of the administrative law judge are vacated, and the case is remanded for consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge